THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 25.09.2007

+ **OMP No.130/2004**

M/S ERA CONSTRUCTIONS (INDIA) LIMITED ...Petitioner

- versus -

MR. D.K. SHARMA, PROP. KESHAV SECURITY SERVICES (REGD.) ...Respondent

Advocates who appeared in this case:
For the Petitioner : Mr Manoj K. Singh with Ms Gunita Pahwa
For the Respondent : Mr Sunil Ahuja

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment ? Yes

2. To be referred to the Reporter or not ? Yes

3. Whether the judgment should be reported in Digest ? Yes

BADAR DURREZ AHMED, J

1. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the said Act') whereby the petitioner has sought the setting aside of the impugned award dated 08.01.2004 passed by the learned sole Arbitrator [Justice Mohd. Shamim (retired)]. The petitioner herein [Era Constructions (I) Ltd] was the respondent in the arbitration proceedings. The respondent [D.K. Sharma,

Proprietor of Keshav Security Services (Regd.)] was the claimant before the arbitrator.

2. The impugned award has been assailed before this court on three grounds. The first ground is that certain materials disclosed to the learned Arbitrator during conciliation have been used by the learned Arbitrator in the course of the award and therefore the requirement of confidentiality under Section 75 read with Section 30 of the said Act has been breached. The second ground taken by the learned counsel for the petitioner is that the arbitration was invoked by a letter dated 05.06.2000 and, therefore, only the claims limited to three years prior to this date ought to have been considered by the learned Arbitrator. It was contended that since the Arbitrator calculated dues from 1995 onwards, part of the claim was clearly time barred. The third ground canvassed by the learned counsel for the petitioner was that for the period after 01.01.1999, there was evidence only in respect of four persons employed as security guards at the petitioner's installations. But the learned Arbitrator has made an award in favour of the respondent in respect of 35 persons only on the basis of the evidence with regard to 4 persons. It was contended that merely because there was evidence that 4 persons

were engaged, the same could not be extrapolated to infer that 35 persons were engaged.

2. Briefly stated the facts are that the respondent, who was the claimant before the learned Arbitrator, filed a claim of Rs 20,56,833/- against the petitioner herein. The respondent (D.K. Sharma) is the proprietor of Keshav Security Services and he is involved in the business of providing security services to industrial / business houses through his security guards who are ex-servicemen and / or retired personnel from paramilitary forces. The petitioner carries on the business of construction and development works at different places. It required security arrangements for all its sites and, therefore, approached the respondent for providing security services in respect of its different sites located in different States. An agreement had been entered into on 23.08.1995 between the parties for providing such security arrangements. As per the claimant (the respondent herein), during the course of the agreement, a running account was maintained between the parties. The respondent used to raise bills on the petitioner and the petitioner on the other hand used to make payments. A detailed statement of account for the entire period from 01.09.1995 till 31.03.1999 was placed before the

learned Arbitrator and has been annexed with the award as Annexure C-3. Since it would be material to consider this account, it may be relevant to point out that the statement of account reveals that bills have been raised from time to time by the respondent on the petitioner. The same were reflected in the statement of account. As against this, the petitioner was paying amounts to the respondent from time to time which did not exactly correspond to the bill amounts. This also stands reflected in the said statement of accounts. The statement of account maintained by the respondent in respect of the petitioner indicates that the bills were shown on the debit side and the amounts received from time to time from the petitioner were shown on the credit side. The first bill shown in the statement of account is of 01.09.1995. The last bill is of 31.03.1999. The first payment made by the petitioner is of 13.09.1995 and the last payment is of 03.04.1999. As per the statement, a balance amount of Rs 10,61,990.71 was due from and payable by the petitioner as on 03.04.1999.

3. Taking up the first ground raised by the learned counsel for the petitioner, one finds that Section 75 of the said Act provides that notwithstanding anything contained in any other law for the time being

in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. It is also provided that confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for the purposes of implementation and enforcement. Section 75 falls within Part III of the said Act which pertains to conciliation and has no reference to Part I of the Act which deals with arbitration. Faced with this situation, the learned counsel for the petitioner sought to invoke the provisions of Section 30 of the said Act which falls within Part I and relates to settlement. Section 30 stipulates that it is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement. It was submitted that some sort of conciliation and / or settlement was conducted before the learned Arbitrator and the petitioner had disclosed certain confidential matter which was used by the learned Arbitrator against the petitioner. First of all, it must be stated that the learned counsel for the petitioner was unable to point out any material which the learned Arbitrator had used and which did not already form part of the record. Secondly, Section 30

relates to an arbitral award resulting, on agreed terms, in the course of settlement. The present award is not an award on agreed terms but is an award made by the learned Arbitrator on contest by the parties. Therefore, invoking the provisions of Section 30 would not be appropriate. In any event, this argument with regard to confidentiality is without any factual basis as nothing has been pointed out which would enable this court to come to the conclusion that the Arbitrator based his award on confidential material provided by the petitioner during the course of arbitration / conciliation.

4. The next point of limitation was also taken up before the learned Arbitrator. It was urged that the notice for payment was issued by the respondent on 05.06.2000 and thus the claim could, if at all, be made for the period 06.06.1997 onwards, which, according to the petitioner, would be limited to a sum of Rs 4,44,392/- and would not extend to the amount of Rs 10,61,990/- as shown in the statement of account. The learned Arbitrator rejected this contention of the petitioner primarily on the ground that a running account was being maintained between the parties as indicated by Annexure C-3 mentioned above. The learned Arbitrator noted that the last payment was made by the petitioner

to the respondent on 03.04.1999 for a sum of Rs 9,975/- and thus the period of limitation would start running from that date. The learned Arbitrator held that if the period was so computed, then the claim made by the respondent (claimant) was very much within time inasmuch as the notice invoking arbitration was issued on 05.06.2000 which was within three years of 03.04.1999.

5. Blacks Law Dictionary, 6th Edition, defines a running account in the following manner:-

> "**Running account.** An open unsettled account, as distinguished from a stated and liquidated account. Running accounts mean mutual accounts and reciprocal demands between the parties, which accounts and demands remain open and unsettled."

In other words, a running account is one which is unsettled and is open. It is distinct and different from a stated and / or liquidated account where the amount stands crystalised. In this context, it would be fruitful to refer to Article 1 and Article 26 of the Schedule to the Limitation Act, 1963. Article 1 relates to suits in respect of balance due on a mutual open and current account, where there have been reciprocal demands between the parties. The period of limitation prescribed is three years from the close of the year in which the last item admitted or proved is

entered in the account and such year is to be computed as in the account. If the statement of account between the parties is to be regarded as a mutual open and current account, then the period of limitation of three years would begin from the close of the year in which the last item admitted or proved is entered in the account. It was contended on behalf of the claimant that the last admitted item in the account between the parties was the payment made by the petitioner to the respondent on 03.04.1999 and, therefore, the start of the period would be the close of the year in which this payment was made. He submitted that the financial year ending of 31st March was taken as the accounting year and, therefore, in point of fact, the period of limitation would begin not from 03.04.1999, but from 31.03.2000 which is the close of the year in which the last payment (i.e., on 03.04.1999) was made. This would be the position if Article 1 of the Schedule to the Limitation Act, 1963 were to apply.

6. Article 26 of the said Schedule refers to suits for money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them. The period of limitation that is prescribed under this Article is of three years and the time from

which it begins to run is when the accounts are stated in writing signed by the defendant or his agent duly authorised in this behalf, unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, when that time arrives. This is certainly not the case here.

7. Therefore, it needs to be determined as to whether Article 1 of the Schedule to the Limitation Act, 1963 would be applicable in the present case. As already indicated above, the accounts maintained by the petitioner and the respondent were not settled and there were debit and credit entries throughout the period of transactions and ending with the last transaction of 03.04.1999 which was a payment made by the petitioner to the respondent. As already indicated above there is no evidence whatsoever that the accounts had been stated between the parties and much less in the form required under Article 26 of the Limitation Act, 1963. That being the position, I am of the view that the learned Arbitrator was correct in holding that the parties maintained a running account. But, merely because there was a running, open or current account in respect of transactions between the parties does not

mean that Article 1 of the Limitation Act, 1963 would apply. This is where the learned Arbitrator has gone wrong. He observed as under:-

> "Furthermore it was a running account vide annexure C-3 whenever the payments fell due from the respondent they made the payment to the claimant on the basis of the bills which were submitted to them. The last payment was made by the respondent to the claimant on 03.04.1999 in the sum of Rs 9,975/-. Thus the period of limitation would start running from the said date. If the period is so computed then the claim of the claimant is very much within time. The notice of the reference of the present dispute to arbitration was issued to the respondent on 05.06.2000 and was duly served upon them hence the present claim is very much within time if the period of limitation is computed from the said date."

What the learned Arbitrator failed to consider was that for Article 1 of the Schedule to the Limitation Act, 1963 to apply, it was necessary to establish that the account was not only open and current but also mutual where there have been reciprocal demands between the parties. This aspect of the matter has clearly escaped the attention of the learned Arbitrator. Article 1 of the Schedule to the Limitation Act, 1963 falls in Part-I which pertains to suits relating to accounts. The said Article reads as under:-

Description of suit	***Period of limitation***	***Time from which period begins to run***

For the balance due on a mutual, open and current account where there have been reciprocal demands between the parties.	Three years	The close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account.

8. As already pointed out above, there is no difficulty in concluding that the account between the parties in the present case was open and current and had not been settled or stated. The only question that needs to be considered is whether the account could be construed as a mutual account where there have been reciprocal demands between the parties. As observed by the Supreme Court in the case of ***Kesharichand Jaisukhlal v. Shillong Banking Corpn. Ltd: AIR 1965 SC 1711***, the leading case on mutual accounts is that of ***Hirada Basappa v. Gadigi Muddappa*: (*1871) VI Madras High Court Reports 142, 144*** wherein it was observed as under:-

> "To be mutual there must be transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations."

In ***The Hindustan Forest Company v. Lal Chand & Ors.: AIR 1959 SC 1349***, the Supreme Court observed that the question of what is a mutual account had been considered by the courts frequently and the test to

determine the same was well settled. In this context, the Supreme Court referred to the case of ***Tea Financing Syndicate Ltd. v. Chandrakamal Bezbaruah:*** ***(1930) ILR 58 Calcutta 649.*** In the said Calcutta decision the following test had been laid down:-

> "There can, I think, be no doubt that the requirement of reciprocal demands involves, as all the Indian cases have decided following Halloway, A.C.J., transactions on each side creating independent obligations on the other and not merely transactions which create obligations on one side, those on the other being merely complete or partial discharges of such obligations. It is further clear that goods as well as money may be sent by way of payment. We have therefore to see whether under the deed the tea, sent by the defendant to the plaintiff for sale, was sent merely by way of discharge of the defendant's debt or whether it was sent in the course of dealings designed to create a credit to the defendant as the owner of the tea sold, which credit when brought into the account would operate by way of set-off to reduce the defendant's liability."

The Supreme Court after quoting the aforesaid observations made in the Calcutta decision, noted that the same has never been dissented from and that it lays down the law correctly. In ***Kesharichand Jaisukhlal*** *(supra),* a decision which follows the earlier decision in the case of ***The Hindustan Forest Company*** *(supra)*, the Supreme Court while considering the transactions in the case before it held as under:-

> "In the instant case, there were mutual dealings between the parties. The respondent Bank gave loans on overdrafts, and the appellant made deposits. The loans by the respondent created obligations on the

> appellant to repay them. The respondent was under independent obligations to repay the amount of the cash deposits and to account for the cheques, hundis and drafts deposited for collection. There were thus transactions on each side creating independent obligations on the other, and both sets of transactions were entered in the same account. The deposits made by the appellant were not merely complete or partial discharges of its obligations to the respondent. There were shifting balances; on many occasions the balance was in favour of the appellant and on many other occasions, the balance was in favour of the respondent. There were reciprocal demands between the parties, and the account was mutual. This mutual account was fairly active up to June 25, 1947. It is not shown that the account ceased to be mutual thereafter. The parties contemplated the possibility of mutual dealings in future. The mutual account continued until December 29, 1950 when the last entry in the account was made. It is conceded on behalf of the appellant that if the account was mutual and continued to be so until December 29, 1950, the suit is not barred by limitation, having regard to Section 45(O) of the Banking Companies Act. The Courts below, therefore, rightly answered issue No. 1 in the negative."

A Division Bench of this Court in the case of ***Manish Garg v. M/s. East India Udyog Ltd.: 2001 III AD (Delhi) 493***, after examining the aforesaid two decisions of the Supreme Court, held as under:-

> "8. Thus for an account properly to be called Mutual Account there must be mutual dealing in the sense that both the parties come under liability under each other. In this case, this ingredient is not satisfied. It was simply a case of debtor and creditor only and not a case of mutual obligations which will in the ordinary way result in enforceable liabilities on each side. Mutual Account is

when each has a demand or right of action against the other."

9. On an examination of the well settled law on the subject, it is clear that for an account to be not nominated as mutual, there must be transactions on each side creating independent obligations. The nature of such an account has been aptly demonstrated in the case of ***Kesharichand Jaisukhlal*** *(supra)* where the deposits made by one party were not merely complete or partial discharges of such obligations towards the other party but there were shifting balances. On many occasions the balance was in favour of one party and on many other occasions, the balance was in favour of other party. There were reciprocal demands between the parties and, therefore, the account was held to be mutual. In the present case, as has been pointed out above, the statement of account reveals that the bills had been raised from time to time by the respondent on the petitioner. As against these bills, the petitioner had been making payments to the respondent from time to time. Though there was no one-to-one correspondence between the payments made and the bills raised, the amounts that represented payments have been shown on the debit side of the account and the amounts received from the petitioner were shown on the credit side. The

said statement of account demonstrates that the payments made by the petitioner to the respondent were merely in discharge of its obligation to the respondent. There were no reciprocal demands between the parties. It was only that bills continued to be raised by the respondent from time to time and the petitioner continued to make payments in discharge of its obligation to pay the amounts reflected in the bills. The account that was maintained between the parties cannot, therefore, be construed to be a mutual account. Consequently, Article 1 of the Schedule to the Limitation Act, 1963 would not apply and, therefore, the benefit of that provision cannot be availed of by the respondent (claimant) for saving part of the claim from being barred by limitation. In the Award itself it is noted that the contract between the parties was essentially one for payment of wages in respect of the security personnel provided by the respondent to the petitioner. The specific period of limitation provided in respect of such contracts is indicated in Article 7 of the Limitation Act, 1963 and it is three years from when the wages accrue due. This being the position, the claim would have to be limited to the period 06.06.1997 onwards. Consequently, the amount awarded would have to be limited to Rs 4,44,392/- and not to the amount of Rs 10,61,990/- as awarded by the learned Arbitrator. The learned counsel for the

respondent had sought to invoke the provisions of Section 19 of the Limitation Act, 1963 in order to save part of the claim being barred by limitation. But, in my view that provision has no application in the facts of the present case.

11. This brings me to the third and last point urged on behalf of the counsel for the petitioner which relates to the period 01.01.1999 to 31.03.1999. Before the learned Arbitrator, the petitioner had set up a counter-claim for an amount of Rs 88,400/-. This counter-claim was based on the condition that the respondent had withdrawn the security guards w.e.f. 31.12.1998, unilaterally and all of a sudden, which, according to the petitioner was in violation of the agreement. It was urged that the agreement provided that the same could be terminated by either party giving notice of 30 days or payment in lieu of the notice. It was, therefore, urged that since no notice as provided under the terms of the agreement was ever given to the petitioner, the petitioner was entitled to a sum of Rs 88,400/- in lieu of the said notice. In response to this condition of the petitioner, the respondent had stated that it was wrong and incorrect that the petitioner had withdrawn the security guards w.e.f. 31.12.1998. According to the respondents, the withdrawal of the guards

took place on 31.03.1999. It was contended that the respondent had given three months time to the petitioner to make its own arrangements of security guards in place of the security guards provided by the respondents. A letter dated 08.02.1999 (Annexure C-2 before the learned Arbitrator) was referred to by the respondent. The learned Arbitrator, after considering the said letter, was of the opinion that it reveals that the security guards were working with the respondent till the said date, i.e., in the month of February, 1999. To further examine the veracity of this opinion, I have examined Annexure C-2 and I find that the same is a letter written by the petitioner to the respondent asking the respondent to withdraw the security guards at any time from the petitioner's various sites. The petitioner, in fact, disclaimed its responsibility and liability for the salaries of the security guards. Apart from this, the learned Arbitrator also examined receipts alongwith the affidavit of one Mr T.S. Sastry who was working with the petitioner which went on to establish that the guards were working even in the months of January, February and March, 1999. It was contended before this court by the learned counsel for the petitioner that acknowledgment of payments in respect of only four guards have been made by the petitioner but the learned Arbitrator has extrapolated this circumstance to

arrive at the conclusion that all the 35 guards were working till March, 1999. In fact, on an examination of the award, it does not appear to be so. What the learned Arbitrator was examining was the counter-claim raised by the petitioner claiming an amount of Rs 88,400/- in lieu of the notice period of 30 days. The learned Arbitrator looked at the evidence on record as also the letter dated 08.02.1999 and found that the security guards were working at the various sites of the petitioner even in February, 1999 much beyond the 30 day period after the purported notice terminating the arrangement was given on 31.12.1998. This clearly meant that the petitioner could not be entitled to any amount in lieu of the notice period. The Arbitrator was not concerned with the question as to whether four guards were working or 35 guards were working. The Arbitrator only examined the question as to whether the petitioner would be entitled to a sum of Rs 88,400/- in lieu of the said notice period. He found that due notice had been given and that, in fact, the guards were found working even beyond 30 days

subsequent to the alleged date of termination of 31.12.1998. It is in this context that the learned Arbitrator came to the conclusion:-

> "Thus they are in the nature of admission which go to show that the security guards were very much continuing with the respondents even in the month of January, February and March, 1999. Thus the

> respondent cannot wriggle out of the same. Hence they are not entitled to the above claim."

Consequently, this contention of the learned counsel for the petitioner also cannot be accepted.

12. In view of the foregoing discussion, the amount of Rs10,51,940/- awarded by the Arbitrator in terms of paragraph 45 of the Award would stand reduced to Rs 4,44,392/-. The rest of the Award remains undisturbed. This petition is disposed of accordingly.

BADAR DURREZ AHMED
(JUDGE)

September 25, 2007
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